U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-T-S- INC.

DATE: AUG. 27, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology consulting services, seeks to employ the Beneficiary as a senior software developer. It requests her classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the position's proffered wage.

On appeal, the Petitioner submits additional evidence, including a letter from its accountant, copies of monthly bank account statements, and proof of its access to a line of credit. The company asserts that these materials demonstrate its ability to pay.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the requested visa classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence status. 8 C.F.R. § 204.5(g)(2). For petitioners with less than 100 employees, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of senior software developer as $112,000 a year. The petition's priority date is December 16, 2016, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2018 was not yet available. We will therefore consider the company's ability to pay in only 2016 and 2017.

The record indicates the Petitioner's employment of the Beneficiary in a temporary, nonimmigrant visa status since 2013. The Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, indicating that it paid the Beneficiary $85,129.70 in 2016 and $86,181.80 in 2017. These amounts do not equal or exceed the annual proffered wage of $112,000. Based solely on the Petitioner's payments to the Beneficiary, the record therefore does not demonstrate the Petitioner's ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. It need only demonstrate its ability to pay $26,870.30 in 2016 and $25,818.20 in 2017, the differences between the annual proffered wage and the amounts the Petitioner paid the Beneficiary in the respective years.

The Petitioner also submitted copies of its federal income tax returns for 2016 and 2017. The returns reflect negative amounts of net income and net current assets for both years. The Petitioner asserts that its net income totaled $138,465 in 2016, as listed on line 21, "Ordinary business income (loss)," of its IRS Form 1120S, U.S. Income Tax Return for an S Corporation. The Petitioner, however, elected to be treated as an S corporation for federal tax purposes and therefore deducted additional equipment costs from its income on Schedule K of the Form 1120S. *See* 26 U.S.C. § 1362. Therefore, the -$51,271 income reconciliation amount on line 18 of Schedule K more accurately reflects the Petitioner's reported income.

Thus, the record does not establish the Petitioner's ability to pay the differences between the proffered wage and the amounts it paid the Beneficiary in 2016 or 2017. Based on examinations of the Petitioner's payments to the Beneficiary, its net income, and its net current assets, the record does not demonstrate the Petitioner's ability to pay the proffered wage.

In addition, USCIS records indicate the Petitioner's filing of immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and any other petitions that were pending or approved as of this petition's priority date of December 16, 2016, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our

revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[1]

In response to the Director's written request for evidence (RFE) on a prior petition for the Beneficiary, the Petitioner submitted a list of 31 of its other immigrant petitions that were pending or approved as of December 16, 2016, or filed thereafter.[2] Contrary to the RFE, however, the Petitioner did not provide the proffered wages of these other petitions. We are therefore unable to calculate the Petitioner's ability to pay the combined proffered wages of all applicable petitions. Also, USCIS records identify at least 14 more of the Petitioner's immigrant petitions that were pending or approved as of December 16, 2016, or filed thereafter.[3] Without the requested information to calculate the Petitioner's total wage burden, we cannot find that the Petitioner has the ability to pay the combined proffered wages.

On appeal, the Petitioner submits a letter from its accountant providing additional details regarding the company's finances in 2016 and 2017. For 2016, the accountant states that the Petitioner would have generated more net income had the company not deducted $129,517 in bad debts that had accumulated since 2008. The accountant also states that the company invested more than $365,000 in a software product that year. For 2017, the accountant states that the company invested more than $400,000 in the product and incurred "onetime" legal and business development expenses of $87,000 and $40,000, respectively.

Under *Sonegawa*, we may consider uncharacteristic losses or expenses in determining a petitioner's ability to pay a proffered wage. Unlike the petitioner in *Sonegawa*, however, the Petitioner here did not sufficiently document the claimed, uncharacteristic expenses. As the company claims, the Petitioner's 2016 federal income tax return reflects a $129,517 deduction for bad debts. But the record lacks documentary evidence of the debts and their purported accumulation since 2008. Also, even if the Petitioner established the $129,517 deduction as uncharacteristic, adding back that amount to the company's negative net income in 2016 would not establish the Petitioner's ability to pay the proffered wage of the Beneficiary, let alone the combined proffered wages of her and the other foreign nationals.

Similarly, the record lacks sufficient evidence of the claimed, one-time, legal and business development expenses of $87,000 and $40,000, respectively, in 2017. The Petitioner's tax return for that year lists total deductions of $173,564 in legal expenses and $118,444 in business development expenses. The record, however, lacks specific evidence demonstrating the "onetime" nature of the claimed portions of these expenses.

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[1] The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that it withdrew, or, unless pending on appeal, that USCIS denied, revoked, or rejected. The Petitioner also need not demonstrate its ability to pay the proffered wages of petitions before their priority dates, or after their beneficiaries obtain lawful permanent residence.

[2] The Petitioner need not demonstrate its ability to pay the proffered wages of two of the petitions it identified: [redacted]; and [redacted] USCIS records indicate that the Agency revoked the approvals of those two petitions.

[3] USCIS records identify the 14 additional petitions by the following receipt numbers: [redacted]; and [redacted]

In addition, the Petitioner has not submitted specific evidence of its claimed software product investments in 2016 and 2017. Also, because the Petitioner invested similar amounts in the product in both 2016 and 2017, the record does not establish the claimed, uncharacteristic nature of the expenses. For the foregoing reasons, the accountant's letter does not establish the Petitioner's ability to pay the proffered wage.

The Petitioner also submitted copies of its monthly bank statements from February 2017 through January 2019, arguing that the month-end balances average more than $250,000, demonstrating its ability to pay the proffered wage. As previously indicated, however, the record lacks required evidence of the Petitioner's ability to pay in 2018 or 2019. We will therefore not consider the company's bank statements for 2018 and 2019. Also, we assume that the Petitioner included the funds in its bank account in its list of current assets on its 2017 federal income tax return. *See* Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000) (stating that "current assets" consist of items that can be liquidated within a year, such as cash, marketable securities, inventory, and prepaid expenses). The Petitioner has not demonstrated that the funds in its bank accounts represent additional money available to pay the proffered wage in 2017. The Petitioner's bank account statements therefore do not establish its ability to pay the proffered wage.

In addition, the Petitioner submits evidence of its access to a line of credit with an available balance of more than $500,000. A bank's commitment to provide a business with a maximum amount of credit during a specified period, however, is unenforceable. A credit line does not contractually or legally obligate a bank to advance money to a customer. *See* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998). Because the Petitioner's credit line is not an existing loan, the company has not established that the line's untapped funds are available to pay the proffered wage. *See Rahman v. Chertoff*, 641 F.Supp.2d 349, 351-52 (D. Del. 2009) (affirming our determination that credit lines do not establish abilities to pay "as they are not available and/or guaranteed"). Also, because additional credit would increase the Petitioner's debt, the company has not documented, such as through a detailed business plan or audited cash flow statements, that additional credit would not weaken its overall financial position. The record therefore does not establish that the Petitioner could realistically rely on its credit line to pay the proffered wage.

Finally, the Petitioner asserts that it pays the Beneficiary an annual wage rate of $98,176, just $13,824 below the proffered wage. That amount, however, still does not equal or exceed the annual proffered wage of $112,000. Moreover, the record does not support the asserted annual pay amount. The Petitioner submitted copies of payroll records indicating that, from February 2017 through September 2018, it paid the Beneficiary an hourly rate of $47.20. Based on a 40-hour work week, an hourly wage of $47.20 equals $98,176 a year. But, despite the Beneficiary's hourly rate of $47.20, the record does not establish that the Petitioner has paid her $98,176 in 2017 or 2018. In addition, a petitioner must demonstrate its ability to pay a proffered wage "at the time the priority date is established." 8 C.F.R. § 204.5(g)(2). Thus, any recent increase to the Beneficiary's wages or hours would not establish the Petitioner's ability to pay the proffered wage in 2016 or 2017. The claimed, current wage rate of the Beneficiary therefore does not establish the Petitioner's ability to pay the proffered wage.

As previously indicated, we may consider other factors beyond the Petitioner's net income, net current assets, and wages paid in determining its ability to pay the proffered wage. We already considered the Petitioner's purported incurrence of uncharacteristic losses or expenses. Under *Sonegawa*, however, we may also consider: how long the Petitioner has conducted business; its number of employees; the growth of its business; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 1996. As of the first quarter of 2018, a copy of its federal payroll tax returns indicate that it employed 57 people. Copies of the Petitioner's federal income tax returns, however, indicate decreases in its annual gross revenues and salaries/wages paid from 2016 to 2017. The record also does not indicate that the Beneficiary would replace a current employee or outsourced service. Further, unlike the petitioner in *Sonegawa*, the Petitioner here has not demonstrated an outstanding reputation in its industry and must demonstrate its ability to pay the combined proffered wages of multiple petitions. A totality of the circumstances under *Sonegawa* therefore does not establish the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The record on appeal does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the petition's denial. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of N-T-S- Inc.*, ID# 5916505 (AAO Aug. 27, 2019)